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Supreme Court, U.S.
FILED
DEC 27 2000
OFFICE OF THE CLERK

No. 00-468

In the Supreme Court of the United States

MARILYN B. DIONNE, PETITIONER

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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12 pp

QUESTIONS PRESENTED

1. Whether the Secretary met her burden of producing a nondiscriminatory explanation for an adverse employment decision affecting petitioner.

2. Whether the Secretary's failure to apply the Indian Preference Act standards was sufficient to give rise to an inference of intentional discrimination.

3. Whether petitioner's additional evidence was sufficient to give rise to an inference of intentional discrimination.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 209 F.3d 705. The opinion of the district court (Pet. App. A18-A27) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 2000. A petition for rehearing was denied on June 27, 2000 (Pet. App. A30). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a member of the Turtle Mountain Band of Chippewa Indians. Pet App. A3. In May 1991,

petitioner began work as a General Schedule GS-7 clinical nurse for the Belcourt Hospital of the Indian Health Service (IHS), an agency of the Department of Health and Human Services. *Ibid.* After one year, petitioner received a promotion to GS-9. *Ibid.* In September 1992, petitioner applied for a public health nurse position with Belcourt Hospital. *Id.* at A3-A4. The vacancy announcement stated that a hiring preference would be accorded to eligible Indian applicants under the Indian Preference Act (IPA), 25 U.S.C. 472. The IPA gives employment preference for IHS positions to Indians who are members of federally recognized tribes.

Petitioner was referred for selection to Delbert Haskell, an IHS personnel staffing specialist. Pet. App. A4. Haskell evaluated petitioner's qualifications in accordance with general civil service standards, including the so-called X-118 standards. *Id.* at A5 & n.4. Applying those standards, Haskell concluded that petitioner was qualified for a GS-7 public health nurse position, but that she was not qualified for a GS-9 position. *Id.* at A4. Haskell reached that conclusion because, under the X-118 standards, in order to be eligible for a GS-9 position, an applicant must have one year of specialized professional nursing training that is comparable to the next lower grade in that specialty, and Haskell believed that petitioner's experience as a clinical nurse did not satisfy that requirement. *Id.* at A4, A22-A23. Petitioner voluntarily accepted the GS-7 position. *Id.* at A4.

One year later, petitioner learned that IHS hired a non-Indian as a GS-11 community health nurse. Pet. App. A4. The nurse, Susan Kartes, had a bachelor's degree and three years of community health nursing experience. *Id.* at A23. Using the same standards that

he applied in petitioner's case, Haskell concluded that Kartes met the requirements for the GS-11 grade and rated her accordingly. *Ibid.*

2. After exhausting administrative remedies at Belcourt Hospital and the Equal Employment Opportunity Commission, petitioner filed suit in federal district court against the Secretary of Health and Human Services, alleging that the decision classifying petitioner as a GS-7 was based on race and national origin in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16 (1994 & Supp. IV 1998). Pet. App. A4. The district court granted summary judgment in the Secretary's favor. *Id.* at A18-A27.

The district court first found that petitioner had established a prima facie case of disparate treatment by showing that (1) she was a member of a protected class; (2) she qualified and had applied for a community health nurse position at Belcourt Hospital; (3) IHS denied her a position above grade GS-7; and (4) a non-Indian was hired at grade GS-11. Pet. App. A22. The district court next determined that the Secretary had articulated a legitimate non-discriminatory reason for the grade classification—that petitioner failed to satisfy the X-118 standards for a position above GS-7. *Id.* at A22-A23.

Finally, the court determined that petitioner had failed to introduce any evidence that the nondiscriminatory explanation offered by the Secretary was a pretext for discrimination. Pet. App. A23-A27. The court rejected petitioner's argument that the Secretary's use of the X-118 standards violated the Indian Preference Act and therefore constituted evidence of pretext. *Id.* at A23-A26. The district court concluded that the application of the X-118 standards was consistent with the IPA. *Ibid.* The district court also rejected petitioner's reliance on evidence that three other American

Indian female nurses had to accept demotions in order to make the transition from clinical to community health nursing, as well as evidence that a service unit director had told petitioner that she would have to accept a GS-7 demotion, "[b]ecause that's the way it is." *Id.* at A26-A27. The court concluded that petitioner's evidence was insufficient to support a reasonable inference that the Secretary's use of the X-118 qualification standards to classify petitioner's position was motivated by impermissible discrimination. *Ibid.*

3. The court of appeals affirmed. Pet. App. A1-A17. The court agreed with petitioner that the Secretary should have evaluated her application under standards adopted pursuant to the Indian Preference Act, rather than under the X-118 standards. *Id.* at A7-A9. The court based that conclusion on evidence not presented by either party to the district court that the Secretary had adopted self-contained IPA standards for a limited number of occupations, including public heath, that did not incorporate the X-118 standards. *Ibid.* The court of appeals determined, however, that the Secretary's error in applying the X-118 standards, rather than the special IPA standards, did not support an inference of pretext. *Id.* at A10-A11. The court explained that "[t]here is absolutely no evidence that the application of the wrong standards was anything but an honest mistake." *Id.* at A10. The court added that "[w]ithout more, the evidence only shows that the Secretary applied the wrong standards in the context of a complex administrative system—a system so complex that even the parties to this lawsuit failed to bring the December 1986 transmittal to the attention of the District Court." *Id.* at A10-A11. The court also found that petitioner's additional evidence was insufficient to support a

reasonable inference that discrimination occurred. *Id.* at A9-A10.

Judge Lay dissented. Pet. App. A11-A17. He concluded that the Secretary had failed to meet her burden of producing a legitimate reason for her actions, and that petitioner's evidence was in any event sufficient to raise an inference of pretext. *Ibid.*

ARGUMENT

Petitioner contends that the court below misapplied the standards for determining whether a plaintiff has established disparate treatment in violation of Title VII. The court of appeals, however, applied the settled standards for resolving that issue, and its fact-bound application of those standards raises no issue warranting this Court's review.

1. Petitioner first contends (Pet. 14-17) that the court of appeals erred in holding that the Secretary satisfied her burden of producing a nondiscriminatory explanation for classifying petitioner as a GS-7. That contention is without merit.

Under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973), once the plaintiff in a Title VII case establishes a prima facie case of prohibited discrimination, the burden shifts to the employer to produce evidence of a nondiscriminatory explanation for the decision at issue. In this case, the Secretary introduced evidence that she classified petitioner as a GS-7 because petitioner did not satisfy the X-118 standards for a classification above GS-7. Pet. App. A22-A23. That evidence was sufficient to satisfy the Secretary's burden of producing a nondiscriminatory explanation for the classification decision.

Petitioner contends (Pet. 15 & n.12, 17 n.15) that reliance on the X-118 standards was not a "legitimate"

nondiscriminatory explanation because the Secretary was required to follow the special IPA standards rather than the X-118 standards. In order to satisfy its burden of production, however, an employer need only produce evidence that it based its decision on a nondiscriminatory reason; it need not show that the basis for the decision is otherwise proper.

Hazen Paper Co. v. *Biggins*, 507 U.S. 604, 612 (1993), is controlling on that point. In *Hazen Paper*, a plaintiff who was terminated shortly before his pension rights would have vested alleged that he was subjected to discrimination on the basis of age in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* The Court held that a decision to fire an employee solely because a pension based on years of service was close to vesting would constitute a violation of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, but it would not constitute a violation of the ADEA. 507 U.S. at 612. The Court explained:

> Although some language in our prior cases might be read to mean that an employer violates the ADEA whenever its reason for firing an employee is improper in any respect, *see McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973) (creating proof framework applicable to ADEA) (employer must have "legitimate, nondiscriminatory reason" for action against employee), this reading is obviously incorrect. For example, it cannot be true that an employer who fires an older black worker because the worker is black thereby violates the ADEA. The employee's race is an improper reason, but it is improper under Title VII, not the ADEA.

Ibid.

That analysis is equally applicable here. The Secretary's use of the X-118 standards may not have been consistent with the Secretary's own procedures for classifying members of federally recognized Tribes or with the IPA. But evidence that the Secretary relied on the X-118 standards in classifying petitioner and that petitioner was not entitled to a grade above GS-7 under those standards was sufficient to satisfy the Secretary's burden of producing evidence that the classification decision was not based on race or national origin in violation of Title VII.

2. Petitioner next contends (Pet. 16-18) that the court of appeals erred in holding that a reasonable factfinder could not infer that the Secretary's use of improper standards reflected an intent to discriminate on the basis of race or national origin. As the court of appeals recognized, evidence that an employer has failed to follow its own standards can be evidence of discriminatory intent. Pet. App. A11. In this case, however, the specialist who made the classification decision explained that he thought that the IPA applied only to selection decisions, not grade classifications. *Id.* at A83-A86. In addition, the specialist "applied the wrong standards in the context of a complex administrative system—a system so complex that even the parties to this lawsuit failed to bring the December 1986 transmittal to the attention of the District Court." *Id.* at A10-A11. Moreover, petitioner offered "absolutely no evidence" that the failure to follow the 1986 procedures "was anything but an honest mistake." *Id.* at A10. In those circumstances, the court of appeals determined that the Secretary's failure to follow the special IPA standards could not give rise to an inference of intentional discrimination, and that fact-bound conclusion does not warrant review.

3. Petitioner next contends (Pet. 19-20) that she introduced sufficient additional evidence to permit a factfinder to infer that the Secretary's explanation was pretextual. In particular, petitioner relies on evidence that three other members of the Turtle Mountain Chippewa Tribe were required to take a demotion in grade in order to make the transition to community health nursing as well as evidence that an IHS service director told petitioner that she was demoted "[b]ecause that's the way it is." Petitioner, however, offered no evidence that the decisions made with respect to the other three tribal members reflected anything other than the application of neutral employment standards. And petitioner offered no evidence that the service director's statement reflected anything other than his genuine belief concerning what the qualifications standards required. In those circumstances, the court of appeals' fact-bound conclusion that petitioner's additional evidence did not raise an inference of discrimination does not raise any issue warranting this Court's review.

4. Finally, petitioner contends (Pet. 21-22) that the court of appeals misapplied summary judgment standards because it did not draw all reasonable inferences in petitioner's favor. That contention reflects a misreading of the decisions below. The court of appeals recognized that it was required to draw all reasonable inferences in petitioner's favor. Pet. App. A9-A11, A20. It simply determined that, based on the record in this case, petitioner's evidence was insufficient to permit a reasonable factfinder to conclude that the decision classifying her as GS-7 reflected an intent to discriminate on the basis of national origin or race.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted

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DECEMBER 2000